



EMPLOYMENT TRIBUNALS

Claimant: Mr S Iyare Otamiyekowie

Respondent: Fedex Express UK Transportation Ltd

Heard at: London South Croydon, in public, by CVP

On: 11 January 2024

Before: Employment Judge Tsamados (sitting alone)

Representation

Claimant: in person (supported by his daughter)

Respondent: Mr Adjei, Counsel

RESERVED COSTS JUDGMENT

The Claimant is ordered to pay the Respondent the sum of £2,000 in respect of its legal costs.

REASONS

Background

1. The Claimant, Mr Iyare, was employed as a Loading Bay operative (“LBO”) at the Dartford branch of the Respondent company, FedEx Express UK transportation Limited, a transport company which is part of the Global FedEx Group, collecting and delivering parcels throughout the United Kingdom.
2. He commenced employment on 16 July 2018 and at the time he made his claim he was still employed by the Respondent. The Claimant subsequently resigned from his position and his last day of employment was 25 October 2023.
3. The Claimant had previously brought a claim under the case number 2303747/2020 on 14 August 2020, raising allegations of race discrimination and bullying. The Respondent denied the allegations in its response dated 3 November 2020. The Claimant then withdrew his claim, and the claim was dismissed by the Tribunal on 21 June 2021.
4. The claim which is the subject of this hearing was presented to the Tribunal on 31 July 2021 following a period of Acas early conciliation between 3 and 7 July 2021. It contains complaints against the Respondent of race

discrimination, victimisation, and harassment. It also refers to “fraudulent act and breach of contract and health and safety” although it is not clear in the claim form what these relate to.

5. The Claimant sent a letter to the Tribunal dated 4 December 2021, seeking to amend this claim. This was belatedly considered by the Tribunal at a case management discussion which was held on 30 October 2021. The Claimant sought to amend his claim to include complaints of “race and indirect discrimination” related to disability (sic), “bullying” (sic), “Health and Safety Act”, harassment in breach of section 26 of the Equality Act 2010, victimisation in breach of section 27(1) of the Equality Act 2010, “breach of contract” (but citing Part 1 of the Employment Rights Act 1996), and “fraudulent act” relating to TUPE or the transitional arrangement from TNT to FedEx Express and “psychological discrimination”. This application is at pages 30-31 of the bundle (which I will refer to as “B” followed by the relevant page number from now on).
6. The Respondent’s response to the claim was due by 1 September 2021 but none was received. The Tribunal wrote to the Respondent on 19 August 2022 informing them that in the circumstances a Judgment could now be issued.
7. On 31 August 2022, the Respondent filed a response together with an application under Rule 20 of the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013 (“the 2013 Rules”) for an extension of time in which to serve it. The application explained that the delay was in part due to human error but also due to some confusion as to whether the Tribunal’s correspondence related to the previous claim which had been dismissed. The Respondent was granted an extension of time and the response was accepted.
8. In its response, the Respondent denied that the Claimant was discriminated on the grounds of his race, was victimised, or harassed and stated it was unclear on what basis these complaints were being brought. It also responded to the Claimant’s amended claim as far as it said was possible and sought further particularisation of each of the complaints brought.
9. The case management discussion held on 31 October 2022 was conducted by Employment Judge (“EJ”) Sekhon. There is a lengthy record of this hearing at B53-66. The Claimant was represented by Mr Membu, a Solicitor, and the Respondent by Mr Adjei of Counsel, who is before me today. This appears to be the first point that the Claimant was legally represented.
10. A number of things became apparent during that hearing: the Claimant said that he was not disabled; that he was not bringing complaints of disability or race discrimination; whilst the amendments sought were clarified, the Claimant and Mr Membu were unable to provide any further and better particulars of those complaints.
11. As a result, EJ Sekhon made the following orders: he listed a public preliminary hearing for 25 February 2023 to determine the Respondent’s strike out/deposit order application; the Claimant was ordered to provide further and better particulars of his claim by 21 November 2022; the

Respondent was given leave to serve an amended response by 7 December 2022; and a further case management discussion was listed to take place on 9 January 2023 to determine the issues. In addition, the EJ made general case management orders and set the final hearing for 5 days commencing on 25 June 2023.

12. The Claimant subsequently changed Solicitors and the Tribunal was informed of this by an email from the new firm dated 3 November 2022.
13. The Claimant did not provide the further and better particulars as ordered.
14. By an email dated 28 November 2022, his new Solicitors wrote to the Tribunal addressing a number of matters but did not deal with the issue of the outstanding further and better particulars.
15. It would appear to be the case (giving them the benefit of the doubt) that the new Solicitors were unaware of what exactly had been dealt with at the case management discussion held in October 2022 and did not have a copy of the record of that hearing.
16. The further and better particulars were eventually provided on 16 December 2022. However, this document is in effect in the form of amended particulars of claim, containing new allegations and new complaints and seeking to resurrect the complaint of disability discrimination which had been abandoned at the case management discussion and also complaints over which the Employment Tribunal has no jurisdiction.
17. The Respondent's Solicitors wrote to the Tribunal on 11 January 2023 raising, amongst other things, the above concerns about the further and better particulars. That email also contained a costs warning based on the allegation that the Claimant's conduct was unreasonable and vexatious.
18. The further case management discussion took place on 16 January 2023 and was conducted by EJ Khalil. The Claimant was this time represented by Mr Yetman of Counsel. Mr Adjei again appeared for the Respondent. The record of that hearing is at B92-95.
19. This sets out the following: the complaints were identified as harassment related to disability, victimisation and unauthorised deductions from wages; however, these all appeared to be complaints pursued by way of amendment; the Claimant was not bringing complaints of race discrimination or breach of contract; a public preliminary hearing would take place on 23 February 2023 (for one day) to determine the Claimant's application for leave to amend his claim and the Respondent's application for a strike out/deposit order; the Claimant was ordered to provide information in support of his disability and to set out clear particulars relied upon in support of each of his complaints by 6 February 2023.
20. By letter dated 23 January 2023, the Respondent's Solicitors sent a costs warning letter to the Claimant's Solicitors (B96-98). This set out the chronology of the claim and put the Claimant on notice that the Respondent intended to make an application for its costs in respect of the previous two

preliminary hearings (estimated to be £4,000 plus VAT). The letter further put the Claimant on notice that if the Respondent was successful in its strike out application it would be seeking its full legal costs (estimated to be £9,000 plus VAT inclusive of the £4,000 already mentioned). The letter cited rule 76(1) of the 2013 Rules. The letter concluded by stating that if the Claimant withdrew his claim by no later than 5 pm on 25 January 2023 and agreed to pay the sum of £1500 plus VAT, the Respondent would not pursue a costs application.

21. It would appear that the Claimant did not accept the Respondent's offer and by letter dated 2 February 2023, the Respondent's Solicitors wrote to the Employment Tribunal making an application for costs in largely the same terms as the above letter. Costs were sought on the basis of his unreasonable conduct in the sum of £6,300 inclusive of VAT. This letter is at B 99-101).
22. By an email dated 6 February 2023, the Claimant's Solicitors wrote to the Employment Tribunal enclosing the Claimant's further and better particulars. The attached document is headed "Claimant Amended Further And Better Particulars of Claim". This is at B102-116.
23. By an email letter dated 15 February 2023, the Claimant's Solicitors responded to the Respondent's Solicitors' costs application (at B134-136)
24. On 23 February 2023, EJ Siddall conducted the open preliminary hearing, the record of which is at B139-148. The Claimant was this time represented by Mr M Ndow-Ngie (who I believe is of Counsel) and the Respondent was again represented by Mr Adjei. In essence, EJ Siddall decided the following: the claim was amended to include the complaints of harassment related to disability and under section 44 of the Employment Rights Act 1996 (that is, detriment related to health and safety); the other amendments were refused. The record of the hearing sets out the chronology of the claim and notes that "the progress of this case has been extremely problematic" citing difficulties arising on the Claimant's side. The EJ made further case management orders to prepare the case for the full hearing and set out the complaints and the issues arising in each.
25. In a separate document, EJ Siddall issued a deposit order (the corrected deposit order is at B160-162). This required the Claimant to pay a deposit of £300 in respect of each of his complaints under section 44 and of a specific complaint of harassment related to disability by 23 March 2023 in order to proceed further. The reasons of the order set out the basis on which the EJ concluded that those complaints had little reasonable prospect of success.
26. By a letter dated 17 April 2023, the Tribunal wrote to the parties advised that on application by the Claimant to re-instate his wages complaint, Employment Judge Siddall had reconsidered her decision as to the amendment application and allowed the complaint of unauthorised deduction from wages (in respect of non-payment of sick pay). She also varied the deposit order to require the Claimant to pay the sum of £150 in respect of each allegation but within 14 days (2 May 2023). It would appear that the Respondent was not

asked for its views prior to the decision on reconsideration. The Claimant's application is at B165-167 and the Tribunal's response is at B168.

27. The Claimant did not pay the deposit within the required time frame and so the Tribunal wrote to the parties on 1 June 2023 asking them to confirm that the only remaining complaints were those of harassment related to disability arising from events on 21 October 2021 and unauthorised deduction from wages in relation to sick pay. This letter is at B171-172. The Respondent's Solicitors confirmed this by email of the same day but clarified that the first complaint related to events on 27 October 2023 (at B173). The Tribunal responded in agreement as to the remaining issue and the date thereof by letter dated 8 June 2023 (at B175).
28. On 16 June 2023, the Claimant, in person, wrote to the Employment Tribunal withdrawing his claim (at B177). In this email he apologised for not doing so sooner and cited a number of reasons, which in essence are as follows: he was awaiting the Tribunal's decision whether to allow his complaint of unauthorised deduction from wages; he had a number of health issues; he was aware that the alleged perpetrator no longer worked for the Respondent; the Respondent had failed to confirm whether that person would be called to give evidence; and his concerns as to whether justice could be done.
29. By letter dated 26 June 2023, the Tribunal wrote to the parties confirming that the hearing dates set for 26 to 30 June 2023 were cancelled in view of the Claimant's withdrawal of his claim (at B179).
30. By email dated 10 August 2023, the Respondent renewed its application for costs (at B180). The Claimant replied by email dated 14 August 2023 opposing the application for costs essentially on the basis that: the application was only to be determined if there was a trial and there was no trial; the Respondent did not state they were seeking costs in June 2023; the two preliminary hearings were necessary to clarify the complaints and issues; and the Respondent did not disclose vital documents (at B181-182).
31. By letter dated 16 August 2023, the Tribunal invited the Respondent to renew its costs application, if so advised, by providing an updated costs schedule or if it is a fresh application advising that it may be out of time (at B183-184).
32. In response, by email dated 23 August, the Respondent's Solicitors advised that it was seeking to update its existing application and provided a detailed costs update letter and costs schedule in support. This is at B187-192. This letter is essentially a repetition of the original application updated to include subsequent events to the date of withdrawal of the claim. The schedule sets out Solicitors' and Counsel's costs to 15 June 2023. Whilst this is in the total sum of £17,130, of course VAT cannot be awarded and Mr Adjei clarified today that the figure exclusive of VAT is £14,275.
33. The Claimant wrote several emails to the Tribunal objecting to the costs application. Whilst he indicated that if the Respondent proceeded with its application he would in turn be seeking his own legal costs against them, he did not make such an application.

34. By letter dated 29 September 2023, the Tribunal sent notice of today's hearing to the parties listed for 3 hours (at B197).

Today's hearing

35. Today's preliminary hearing has been listed to determine the Respondent's application for costs. This is contained within its letter to the Employment Tribunal dated 23 August 2023 (at B187-192).
36. The Respondent provided an electronic bundle of documents running to 249 pages with a separate index and a skeleton argument. The Claimant provided an undated and unsigned witness statement consisting of two pages. I had already read the Claimant's statement in advance of the hearing and considered the documents within the bundle relating to his financial position. I did not require the Claimant to formally give evidence.
37. The hearing was conducted by way of Cloud Video Platform ("CVP"). At the start of the hearing, the Claimant stated that he had been unwell due to high blood pressure and his daughter was with him in case of emergency. He gave no indication that he was not able to continue in these circumstances. However, later on, at 10.55 am, the Claimant asked for a short adjournment because he said he was getting confused by Mr Adjei's submissions. After approximately 10 minutes, I resumed the hearing and the Claimant confirmed that he had taken his medication and was able to continue.
38. At the start of the hearing, I asked the Claimant if he received the relevant documents. Whilst he indicated that he had, he stated that he had not read them. I asked why not and he responded that they only arrived a few days ago and due to medication he sometimes cannot even see. For this reason I asked Mr Adjei if he could talk to his skeleton in detail and direct the Claimant to the referenced documents in the bundle.
39. Mr Adjei went through his written submissions comprehensively, amplifying them where necessary. After he had finished, I then gave the Claimant the opportunity to respond and to make any submissions he wished to make.
40. I do not propose to set the submissions out in full but would assure the parties that I took what they had to say fully into account in reaching my decision. I will only refer specifically to the submissions where necessary.
41. The Respondent is seeking its legal costs in the sum of £14,275 representing its solicitors' and counsel's fees exclusive of VAT. These are broken down in a schedule at B192. In the alternative, the Respondent seeks costs in whatever lesser sum that I find to be appropriate.
42. The application is made under rule 76(1)(a) of the 2013 Rules which states:

"(1) A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that –

(a) a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted."

43. The application is made essentially on the following basis:
 - a. The Claimant has committed a series of acts of unreasonable conduct in the pursuit of his claim, compounded by a failure to explain or apologise;
 - b. This has caused the Respondent to incur unnecessary costs in defending what was ultimately a straightforward claim, with little merit;
 - c. This is the second occasion on which the Claimant has brought a claim against the Respondent and then withdrawn it;
 - d. He was repeatedly warned about his conduct by the Respondent but inexplicably did not alter his ways;
 - e. The Respondent seeks its reasonable costs and there is evidence that supports the Claimant's ability to pay the sum sought or, alternatively, a lesser sum;

44. Mr Adjei's submissions largely set out the events that I have referred to in the background to this matter (above) which are relied upon as evidencing the Claimant's unreasonable conduct.

45. In addition, he has dealt with a number of contentions made by the Claimant in correspondence with reference to documents within the bundle. In essence these are as follows:
 - a. The Respondent had not failed to disclose documents in respect of his unauthorised deduction from wages complaint;
 - b. It was incumbent on the Claimant to set out the factual basis of his complaint. That complaint was not clearly apparent until March 2022 and even when the Tribunal granted permission for the amendment, the Claimant did not immediately advise that the complaint was not about sick pay, as the Tribunal were led to believe, but accident at work benefit;
 - c. The Claimant relied partly on his health as the reason for withdrawing his claim but did not provide any medical evidence in support;
 - d. The Respondent did answer the Claimant's enquiries as to whether his alleged perpetrator was giving evidence by pointing out that they did not intend to call him, his evidence not being relevant to the remaining complaints;
 - e. It is an inescapable conclusion that the Claimant has put forward a series of false reasons for the late withdrawal of his claim because he knew the Respondent would pursue its costs application. Delaying the withdrawal until shortly before the final hearing was a further instance of his unreasonable conduct.

46. Mr Adjei referred me to the relevant law and set out the detail of the allegations of unreasonable conduct at paragraph 16 of his written submissions.

47. Mr Adjei submitted that the Claimant had provided limited evidence of his ability to pay a cost order if one were made. He made the following points:
 - a. The Claimant has provided limited bank statements in respect of two accounts at B218-291 and 224-228. These do not support his claim of impecuniosity as per paragraph 8 of his witness statement;
 - b. He does not explain how he manages to cope financially, eg he does not state if he is in receipt of state benefits;

- c. Whilst he asserts that he has no income, the Claimant sets out payment in respect of his car but does not set out what other financial obligations he has, save that he is able to send money to his family abroad. He does not explain how he is able to make these payments if, as he states, he has no income;
 - d. On his own evidence, the strong inference is that he is in receipt of some income and/or has some savings that allow him to meet the disclosed financial obligations;
 - e. Even if the Tribunal accepts that the Claimant has no income or savings, he has provided no evidence that he would not be able to secure work within a reasonable period of time, if a costs order were made.
48. In oral submissions, Mr Adjei accepted that there should be some reduction of the amount of costs sought, to be fair to the Claimant. He accepted that the following reductions should be made (reference is to B192). The Solicitors' costs for 5 September 2022 of £2,200 relate to presenting and responding to the claim and that the first preliminary hearing which would have taken place in any event; the figure of £500 dated 28 November 2022 appears to relate to the second preliminary hearing. This results in a reduction of £2,700 in Solicitors' costs. Counsel's costs for 28 November 2022 of £1750 should also come out as this appears to be the fee in respect of the second preliminary hearing.
49. After a twenty-minute adjournment, the Claimant responded to Mr Adjei's submissions. Unfortunately, despite a number of steers from me he largely spoke about matters that were either not relevant to the application or misinterpreted events. But in essence he did state that he had not acted unreasonably and had followed the rules whereas the Respondent had withheld a crucial document. He further submitted that he was not allowed to speak at the hearings because he was represented, that it was not in the interests of justice to award costs against him and the Respondent's application was made out of time.
50. In response to my questioning, the Claimant responded as follows:
- a. He confirmed that he resigned from the Respondent's employment and his last day was 25 October 2023. Whilst he was paid his final salary and holiday pay, he has spent this;
 - b. He is not able to pay for his car and is returning it but will have to pay for breaching the contract. It is parked up and he has road tax and insurance from last year and this is still valid;
 - c. He is no longer sending money to his family abroad;
 - d. He cannot afford to go to Spain or pay for his medication;
 - e. He is now living with a friend;
 - f. He has no income and goes to a foundation to take food;
 - g. He has no savings. He only has one bank account with Barclays and was transferring money from his savings account to his current account;
 - h. He is not claiming social security. He did apply but did not have proof of accommodation.
51. Mr Adjei did not wish to ask the Claimant any questions but pointed out that at paragraph 8 of his witness statement he had set out his financial obligations and this is different to what he has said today. He invited me to

find that the witness statement is closer to the truth. He also referred to me the case of Arrowsmith v Nottingham Trent University [2012] EWCA Civ 797 (at paragraph 13 of his written skeleton) on which I could find that even if the Claimant's income is limited, I can take into account that the Claimant can on his own evidence work and there is no evidence that he cannot.

52. The Claimant responded that whilst Mr Adjei states that he can work, Mr Adjei is not a doctor. I replied that the point is more that the Claimant has not presented evidence of his inability to work. The Claimant referred to B220-223 in support of an appointment he has next week because he cannot lift his arm. I pointed out that those documents are not recent and he has not presented any evidence of this. The Claimant further responded that he did not say he could not work simply that he cannot lift and so if he goes to any company to work they will say he cannot work and sack him. I apologised and agreed that yes he had only said he cannot lift his arm not that he could not work.
53. By this time it was 12.40 pm and so after adjourning to consider whether I had any further questions of either party, I said I would give a reserved Judgment.
54. The Respondent confirmed that the revised figure of costs was £9,828 and the Claimant provided me with his new address for the Tribunal's file.

Conclusions

55. Under rule 76(1) of the 2013 Rules, an Employment Tribunal can order a party (called "the paying party") to make a payment in respect of costs incurred by the other party (called "the receiving party"). Costs include the legal fees, disbursements and expenses incurred on or on behalf of the receiving party while legally represented.
56. Under rule 77 of the 2013 Rules, a party may apply for a costs order at any stage up to 28 days after the date on which the Judgment finally determining the proceedings in respect of that party was sent to the parties. Further, no such order may be made unless the paying party has had a reasonable opportunity to make representations (in writing or at a hearing, as the Tribunal may order) in response to the application. I am satisfied that the requirements of rule 77 have been met in this case.
57. The Tribunal may have regard to the paying party's ability to pay when considering whether to make a costs order and if so in determining in what amount (rule 84).
58. Under rule 78, the Tribunal can award costs of up to £20,000 or refer the matter to the County Court for assessment.
59. It is of course important to remember that costs in the Employment Tribunal are the exception rather than the rule and that a costs order should be compensatory and not punitive.

60. The Respondent's application is for its legal costs under rule 76(1)(a) of the 2013 Rules. This is based on the alleged unreasonable conduct of the Claimant in the way that the proceedings have been conducted.
61. I was taken through the history of this claim by Mr Adjei and also went through the history within the correspondence and records of the preliminary hearings contained within the bundle and the Tribunal's file. I also considered the Claimant's witness statement and his documents relating to his ability to pay a costs order, if made. I also considered the submissions of both parties.
62. The Employment Appeal Tribunal in Daly v Newcastle Upon Tyne Hospitals NHS Foundation Trust UKEAT/0197/18 set out a three stage test applying to the consideration of an award of costs. Firstly, the Tribunal must make findings about the party's conduct – "the threshold test". Secondly, if so, the Tribunal should determine whether to exercise its discretion to award costs, taking into account all of the relevant circumstances. Thirdly, if it so decides, the Tribunal may proceed to consider the amount of any award.
63. The Court of Appeal in Barnsley Metropolitan Borough Council v Yerrakalva [2012] IRLR 78 at paragraph 41 of the Judgment gave the following guidance as to the first stage:

"The vital point in exercising the discretion to order costs is to look at the whole picture of what happened in the case and to ask whether there has been unreasonable conduct by the claimant in bringing and conducting the case and, in doing so, to identify the conduct, what was unreasonable about it and what effects it had. The claimant's conduct and its effect on the costs should not be considered in isolation from the rest of the case."

64. The Court of Appeal in McPherson v BNP Paribas (London Branch) [2004] IRLR 558 gave further guidance in the context of the withdrawal of a claim (at paragraph 30):

"The crucial question is whether, in all the circumstances of the case, the claimant withdrawing the claim has conducted the proceedings unreasonably. It is not whether the withdrawal of the claim is in itself unreasonable..."

65. With regard to the Claimant's conduct, I reach the following conclusions;
- a. The Claimant was unrepresented at the outset of his claim. Whilst he may previously have brought a claim which he subsequently withdrew, he was unrepresented at that time and I do not accept that this imbued him with some extensive existing knowledge of employment law when presenting his second claim, beyond perhaps a superficial level gleaned from the internet. Indeed, both his claims indicate a basic misunderstanding of what a Tribunal could and could not deal with and what legal claims were available to him. Whilst his application for leave to amend indicates a slightly greater knowledge of employment law, it is unclear whether or not this was drafted with legal assistance;
 - b. By the time of the first case management discussion, that is 31 October 2022, the Claimant was represented by his first firm of Solicitors. The record of that hearing indicates that the EJ took some considerable time in attempting to clarify the complaints that had been brought and the particulars relating to each. The record of that hearing in particular states that the Claimant and his representative were unable to clarify the allegations being pursued or further particularise the allegations upon request. Further, the Claimant's representative stated that the complaints

- being made were not being made on the basis of race (B54 at paragraph 8);
- c. I have to say that it is not a satisfactory state of affairs that neither the Claimant nor his Solicitor attended this hearing unprepared for this task. This is part of the purpose of a case management discussion. Indeed, the EJ was left with no option but to set an order for further particulars and to list the case for a further preliminary hearing on case management to determine the issues. Whilst the Respondent is not seeking its costs in respect of the first hearing, I do feel that to come to a hearing legally represented and unprepared does amount to unreasonable conduct by the Claimant;
 - d. The Claimant then instructed his second firm of Solicitors. They came on the record on 3 November 2022. To give them the benefit of the doubt for their failure to deal with the case management orders, specifically that relating to further and better particulars, perhaps they were not aware of the full extent of the orders made at the first case management discussion. The case management orders and case summary record was sent to the parties on 5 December 2022. However, the Claimant was represented by the first firm of Solicitors at that hearing and it is reasonable to expect them to have made a note of the dates of compliance even if they did not receive the written record of the hearing until December. Whilst the second firm of Solicitors might not have had this document, it is also reasonable to have expected the Claimant to have advised them of what was decided at that hearing and, if he either did not or could not, to then approach his previous Solicitors or the Respondent's solicitors and find out from them. For these reasons I find that this delay in providing the further and better particulars by the date for compliance and also the lack of any explanation for the failure to do so amounts to unreasonable conduct by the Claimant;
 - e. The Claimant belatedly provided his further and better particulars through the second firm of Solicitors on 28 November 2022 but no explanation was offered for the late compliance. However, this document, far from containing further and better particulars, amounted to redrafted particulars of claim including further allegations and new complaints. In particular, it sought to resurrect the disability discrimination complaint which had been abandoned at the previous hearing and to raise complaints which had already been identified as ones over which the Employment Tribunal had no jurisdiction. I have to assume that the Solicitors were acting on the Claimant's instructions but I would also have expected them to provide professional advice to the Claimant as to how to proceed. Whether the Claimant ignored that advice, if given, or not, I do not know. But I find that the purported further and better particulars also amount to unreasonable conduct. This is particularly so given what happened at the second case management discussion;
 - f. In response to the further and better particulars and other matters, the Respondent's Solicitors wrote to the Tribunal raising its concerns and went as far as giving the Claimant a warning that it reserved its right to seek costs for unreasonable and vexatious conduct;
 - g. The Claimant provided the further, further and better particulars on 16 December 2022 again through his Solicitors. Again, this document failed to comply with the terms of the order and this in turn partially led to the need for a third case management discussion (assuming of course that the Respondent's strike out application was unsuccessful, which it was),

resurrected a disability discrimination complaint (which had been withdrawn at the first case management discussion) and continued to include complaints which the Employment Tribunal had no jurisdiction to hear;

- h. Between 11 and 15 January 2023, the Claimant ignored the email from the Respondent's solicitors that was sent on 11 January 2023 (in which the problems with Claimant's further particulars document were summarised) by taking no steps to remedy the defects and thereby comply with the Tribunal's orders. This failure meant that Claimant and his representative attended the preliminary hearing on 16 January 2023 without having clarified what claims he had brought and what amendments he was seeking (reference the Respondent's letter dated 16 January 2023 at B88-90 and the record of the preliminary hearing held on 23 February 2023 at B140 referenced at paragraphs 8, 13, 14 & 15);
- i. At the second case management discussion held on 16 January 2023 the Claimant was again represented by Counsel. The hearing made some progress in identifying the complaints but whilst the record does not indicate this, the Respondent asserts, both in submissions and in its later costs warning letter, that again both the Claimant and his representative were not able to provide particulars of the complaints. This certainly appears to have been the case given that the EJ had to order the Claimant again and in very precise terms to set out the further and better particulars of his complaints, as well as providing disability information regarding the resurrected disability discrimination complaint. I specifically refer to B94 paragraph 1.1 and the final four bullet points. This lack of certainty of particulars of the complaints also resulted in the need for a further case management hearing (again assuming that the strike out application was unsuccessful, which it was).
- j. On 23 January 2023, the Respondent sent a costs warning letter to the Claimant's Solicitors setting out an estimate of its costs in respect of the previous two hearings and its full legal costs. The Claimant was offered the opportunity to withdraw his claim and to pay £1500 plus VAT in respect of costs and the Respondent would forego any costs application. The Claimant did not accept this offer. The Respondent then made its costs application to the Employment Tribunal by letter dated 2 February 2023. Both letters contained a clear warning to the Claimant via his Solicitors as to why the Respondent considered his conduct of his claim to be unreasonable and (at that stage at least) vexatious:

"The Respondent has been put to considerable costs in dealing with the Claimant's claims, amendment application and the last preliminary hearing. All of which have essentially been concerned with an attempt to clarifying the Claimant's claims, an exercise which should be straightforward, particularly in circumstances where he is legally represented. Yet, the Claimant has found himself in a position where he is unable to succinctly clarify his claims and has U-turned significantly from the position that he expressly and voluntarily set out at the last preliminary hearing. The Respondent avers that the Claimant's conduct has been unreasonable and vexatious. The Respondent expressly reserves its right to make a cost application and in accordance with rule 76(1)(a) and (b) and 76(2).

At the preliminary hearing on 16 January 2023 the Claimant was represented by a solicitor from your firm and counsel. Additionally, he was also in attendance. During the hearing the Claimant confirmed his withdrawal of the race discrimination claim, which was the only claim that he had pleaded in his ET1.

As we understand it, the Claimant was still unable to clarify his claims during the preliminary hearing when questioned by Employment Judge Khalil, particularly in respect of victimisation.

The Claimant has again been ordered to file further and better particulars because he remains unable to articulate his claims.

We have had two preliminary hearings, an ET1 and two amendment applications and still the Claimant is unable to clarify his claims, which is unacceptable particularly in circumstances where he has instructed solicitors and counsel. Consequently, our client has been put to unnecessary costs.

FedEx is of the view that both your clients' claims have been brought vexatiously and that his conduct during the litigation process is entirely unreasonable. Unfortunately FedEx suspects that he has been unduly influenced by other employees/former employees at the same site to litigate against FedEx and bring spurious claims that the tribunal does not have jurisdiction to hear. Your client will be aware that FedEx has successfully brought cost applications in that regard.

Considering the above FedEx is left with no option but to make a cost application against your client to recover the costs it has wasted in participating in the process of your client attempting to clarify his claims and defending this vexatious litigation."

- k. The open preliminary hearing (which subsequently became a case management discussion) took place on 23 February 2023. The Claimant was again represented by Counsel. At that hearing, EJ Siddall allowed the Claimant to amend his claim to include complaints of harassment related to disability and the complaint of health and safety detriment but refused his other amendments. Her case summary indicates that part of the reasons why she refused the other amendments was because of the "extremely problematic" progress of the case on the Claimant's part. I specifically refer to B140 paragraphs 8, 12, 14 and 15. It is also apparent that the Claimant and his representative had difficulties in articulating the complaint of unauthorised deductions from wages and the Claimant's representative attempted to characterise it as a complaint of harassment related to disability. I specifically refer to B141 paragraph 26;
- l. After dealing with identification of the complaints and amendments, EJ Siddall declined to strike out the Claimant's claim but did make a deposit order in respect of two allegations of harassment related to disability and the complaint of health and safety detriment. Upon reconsideration, EJ Siddall allowed the Claimant's amendment (which she had initially refused) to pursue a complaint of unauthorised deductions from wages (which up to this point had been nebulously pleaded) and she also reduced the amount of the deposit payable, which then became payable by 2 May 2023. In the event, the Claimant did not pay the deposit. This left the complaints of harassment relating to events on one specific date and unauthorised deduction from wages;
- m. By letter dated 16 June 2023, the Claimant wrote withdrawing his claim. He apologised for not doing so sooner and cited a number of reasons for this. I have to say on analysis these reasons do not satisfactorily explain why he waited until 16 June, which was ten days before the start of a multi-day hearing, to do so. Taking these one by one:
 - i. The decision regarding his complaint of unauthorised deductions from wages was sent to the parties on 17 April 2023, some two months before;
 - ii. Whilst the Claimant alludes to health issues, these amount to high blood pressure, a shoulder and leg injury. However, he has not provided any medical evidence in support of these matters. Moreover, his Solicitors were still acting for him until at least 17 May 2023, when they wrote to the Employment Tribunal stating that the Claimant had not paid the deposit. There is no indication on the file that the Solicitors ever wrote

- stating they were no longer acting for the Claimant. So there is no obvious reason why they could not have written sooner on his behalf;
- iii. The Claimant asked the Respondent if what he described as a crucial witness had left the Respondent's employment in an email timed at 11:33 am on 16 June 2023. The Respondent replied at 12:08 pm that same day advising the Claimant that neither of his remaining complaints related to that person, set out his remaining complaints and advised the Claimant of its witnesses. These emails are at B179-180. Whilst the Claimant sent his email withdrawing his claim at 17:33 pm that day (at B177), I find it somewhat disingenuous of him to rely on this as a reason for the withdrawal in the terms he gives. Firstly, the Respondent did respond to his enquiry and it was self-evident from the response that the particular individual was not attending, albeit the Respondent did not answer whether he was still in its employment or not. Secondly, the Claimant appears to be aware that this person's employment had been terminated. Thirdly, whilst the Respondent was clear that the individual was not a relevant witness, if the Claimant believed he was, he could have applied for a witness order to secure his attendance. He certainly had Solicitors acting for him until at least 17 May 2023;
- n. Overall, I reach the conclusion that the reasons given are insufficient and self-serving so as to justify what on any analysis is an extremely belated withdrawal of the claim and I believe it amounts to unreasonable conduct given work already undertaken towards preparing the case for a multi-day hearing due to start on 26 June 2023.
66. In the circumstances, I find that the Claimant has acted unreasonably in a number of respects as set out above and ultimately left it far too late to withdraw his claim.
67. I then turned to consider the Claimant's ability to pay a costs order and the evidence he provided as to his means.
68. I am concerned that the Claimant's evidence, written, oral and documentary, is unreliable. If I accept what he says, he's living with a friend and has no income and no savings, has not applied for Social Security benefits because he cannot provide proof of accommodation and has not applied for work because he believes that any prospective employers would not employ him because of his physical conditions.
69. This is at odds with what he said in the witness statement he provided and he is only provided limited documentary evidence in support of what funds he has available to him in his bank accounts. His witness statement prepared for this hearing indicates that he has some income.
70. I am not convinced that simply because he is staying with a friend he would not be able to claim Social Security benefits. I also do not accept it is reasonable to take the view that because he believes that prospective employers would not employ him he has not applied for any jobs. I also take into account that whilst he might not have any income or employment at the moment that is not to say this would not change in the foreseeable future.

71. On this basis I believe that he should pay an amount in respect of the Respondent's costs. The Respondent is seeking a revised figure of £9,828. With the best will in the world I am not suggesting that the Claimant should pay this sum or indeed is in a position to do so. However, taking account of the concerns I have about the veracity of his evidence and its credibility, that he gave the impression in his witness statement that he did have some income, that he has not given full disclosure of documentary evidence in support and that he does have reasonable avenues available to him to claim Social Security benefits and to seek employment, I put the figure of £2,000 on the amount I award him to pay to the Respondent in respect of its costs.
72. As a footnote I would hope that the Respondent would be willing to enter into some arrangement with the Claimant for payment by instalments, although I appreciate that I cannot oblige them to do so.

Employment Judge Tsamados
Date: 26 April 2024

Sent to the parties on
Date: 16 September 2024

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